Before the

FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

In the Matter of)	
)	
Universal Service Contribution)	WC Docket No. 6-122
Methodology)	
)	
A National Broadband Plan For)	GN Docket No. 09-51
Our Future	j	

COMMENTS OF AMERICAN PUBLIC COMMUNICATIONS COUNCIL, INC.

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The American Public Communications Council ("APCC") hereby submits its comments in response to the Further Notice of Proposed Rulemaking ("FNPRM") in the above referenced matter. ¹

INTRODUCTION AND SUMMARY

As discussed below, payphone service providers ("PSP"s) are not "telecommunications carriers." ² Therefore, PSPs can be required to contribute to USF only if the "public interest so requires." ³ The Commission exercised its permissive authority to impose a USF ⁴ contribution

¹ *Universal Service Contribution Methodology*, WC Docket No. 06-122, A National Broadband Plan for Our Future, GN Docket No. 09-51, Further Notice of Proposed Rulemaking, FCC 12-46 (Released April 30, 2012), 77 Fed. Reg. 33896 (June 7, 2012).

 $^{^2}$ Section 3(44) of the Communications Act, 47 USC 153(44) specifically excludes "aggregators of telecommunications services (as defined in section 226 [47 USC 226])." PSPs are within the definition of aggregator.

³ 47 USC §254(d).

⁴ The acronym "USF" is used to denote either the "universal service fund" or "universal service funding", as the context may require.

requirement on independent PSPs. The requirements imposed on PSPs were the same general requirements as the Commission imposed on other service providers. The majority of PSPs are very small businesses and are *de minimis* payors. Only a small handful of PSPs are direct payors.

The Commission originally based its decision that the public interest required independent PSPs to pay into the USF ⁵ in order to keep independent PSPs on a competitive parity with the LECs, who also provided payphone service and as "telecommunications carriers" were required by statute to contribute to the USF. But the Commission's equalizing competition rationale is no longer applicable. All of the major LECs have left the payphone business so there is no need to impose USF obligations on PSPs to achieve competitive neutrality. Thus, the Commission must decide whether to impose a contribution requirement on PSPs based solely on whether other public interest considerations require that PSPs contribute to USF.

As we demonstrate below, the public interest requires the opposite – that PSPs not only not "contribute" to USF, but that payphones be released from being required to support USF. ⁶ Under the Commission's current rules and practices, all PSPs provide support for USF. As mentioned, only a handful of PSPs are direct payors and they provide support to USF directly. While the majority of PSPs are *de minimis* payors and "exempt" from "contributing" to USF, the exemption does not release PSPs from the requirement to provide support to USF since the *de*

⁵ E.g., FNPRM, ¶9, citing Federal-State Joint Board on Universal Service, 12 FCC Rcd 8776, 9183-85, ¶¶ 794-798 (hereafter "Universal Service First Report and Order").

⁶ To be clear, APCC uses the word "release" to mean being freed of the obligation to pay or to provide support for USF through making payments that ultimately (as when paid to USAC by the LEC who collects pass-through costs from *de minimis* payors or the IXC providing services to a *de minimis* payor who collects pass-through costs from *de minimis* payors) provide support for USF. We use "release" to distinguish it from, for example, "exempt" from USF, which as explained in the text following this note, does not really "exempt" from payment to provide "support" but exempts the beneficiary from the filing and direct payment requirements. Similarly, we use "support USF" or "provide support for USF" on the opposite side to distinguish it from "contribute", which generally does not merely mean provide "support" for USF. "Contribute" generally connotes provide support in the form of paying directly into USF (through USAC) and filing 499Qs.

minimis PSPs must still pay pass-through charges imposed by the vendors providing them services, i.e., LECs and IXCs. All PSPs should be released from the obligation to provide support to USF.

For the reasons discussed above, there is no longer any "fairness" rationale for requiring PSPs to provide support for USF. The efficiency of administering the USF is not affected by releasing PSPs from providing support to USF. Any adjustments to the USF system necessitated by releasing PSPs from providing USF support are easily integrated into the system.

Nor is it essential to the sustainability of the USF for PSPs to provide support for USF. Of importance, the total amount PSPs pay to provide USF support is relatively very small. Moreover releasing payphones from providing USF support will actually help sustain universal service. Payphones are the universal service provider of last resort, and the promotion of their deployment is vital to universal service. The Commission's policies should be directed to increase the deployment of payphones. ⁷ Certainly the Commission's rules and policies should not retard the deployment of payphones, as its current policies do. The Commission requires PSPs to provide support for USF when payphones are only marginally profitable themselves. The support for USF paid by PSPs can and often is the difference between whether a payphone remains in place to help advance universal service goals or is removed, thereby depriving the low income consumers who rely on the payphone of any service at all.

In the unlikely event that the Commission does not release PSPs entirely from providing support for USF, the Commission should establish a special category for payphones such that payphones provide support at a lower rate than other providers of telecommunications services,

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⁷ See 47 USC §276, where Congress mandates that the Commission shall "promote the widespread deployment of payphone services."

no matter whether the USF contributions are based on revenue, numbers, or class of service/connections.

If PSPs are required to provide support to the USF, the Commission should direct that PSPs who are subject to the *de minimis* threshold be allowed to file form 499Q's (or any counterpart forms or follow any filing procedures adopted in response to the comments submitted in this docket) and contribute directly. Under the current system, direct contributor and *de minimis* PSPs make roughly the same USF payment on interstate traffic from a payphone. But the direct payor can allocate correctly between interstate and intrastate the amount that the *de minimis* payor is charged in pass-through charges by the LEC. Because virtually all end user revenue is from local coin calling, the allocation to interstate is minimal. As a result, "exempt" *de minimis* smaller PSPs who pay the full LEC pass-through pay more in USF charges per payphone than the few large PSPs who are direct contributors.

Allowing direct contribution by *de minimis* payors would address this imbalance within the PSP business. It would also allow small businesses to benefit from a policy one of whose purposes is to relieve small businesses of administrative burdens but that in fact ends up costing them more than it typically would cost to do the filings. It would also correct the jurisdictional misallocation caused by having what is now a pass-through charge incorrectly allocated.

The Commission should treat prepaid calling card providers and PSPs symmetrically.

STATEMENT OF INTEREST

APCC is the national trade association representing the interests of independent (*i.e.* non-LEC) PSP. APCC's more than 700 members operate the majority of existing payphones. APCC's members are all sole proprietorships or small businesses.

DISCUSSION

The Rationale for Imposing USF Obligations on PSPs No Longer Applies

The rationale advanced by the Commission in imposing USF obligations on PSPs was that it was necessary in order to preserve competitive neutrality as between LEC and non-LEC providers of payphone services.

The Commission recognized that PSPs were not telecommunications carriers. The Commission reasoned that because the ILECs provided payphone service and the ILECs were telecommunications carriers, the ILECs would be paying into the USF. Because the ILEC payphone operations competed with independent PSPs, the independent PSPs should also pay into the USF. It was this consideration that drove the Commission to require independent PSPs to pay into the USF.

Developments in the payphone market have now totally eroded the factual predicate of the Commission's ruling. ⁹ In 1997, when the Commission imposed the requirement that

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⁸ The Commission makes repeated references in the *FNPRM* to this point with repeated citations to the *Universal Service First Report and Order, supra*, note 5. *See, FNPRM*, ¶¶9, 36, note 433.

The Commission has never addressed this argument on the merits. See Federal-State Joint Board on Universal Service, Order on Reconsideration, 19 FCC Rcd 23824, 23838 (2004) (declining reconsideration because APCC "does not rely on facts that have not been previously presented") (emphasis added). In any event, as discussed in the text following this note, the original factual basis of the Commission's decision has now been totally undermined.

independent PSPs contribute to USF, the BOCs held the overwhelming majority of payphones with independent ILECs holding additional payphones. According to the latest official statistics, as of 1999, ¹⁰ the first date for which comparative data is available, ¹¹ independent PSPs held 735,572 payphones, or 34.6 %, the BOCs held 1,305,463 payphones, or 61.4%, and the independent LECs held 163,009 payphones, or 3.7 %. ¹²

By contrast, today, virtually the entire base of payphones is owned by independent non-LEC payphone operators. All of the former Bell Operating Companies ("BOC"s) have now totally exited the payphone marketplace and given up entirely their payphone operations. Based on the latest FCC data ¹³, as of March 31, 2009, there were 555,128 payphones in total. ¹⁴ Of these, the BOCs owned 157,824 and independent PSPs owned 343,152, for a total of 500,976, or over 90% of the payphones. Since all the BOC phones are now owned by independent PSPs, it is independent PSPs who account for 90+% of the market. The remaining phones are presumably owned by independent LECs. ¹⁵

¹⁰ *Trends in Telephone Service*, Industry Analysis and Technology Division, Wireline Competition Division, at 7-11 (September, 2010).

¹¹ The 1997-1998 data for relative holdings is not available because the Commission changed the way it counts payphones.

¹² If anything, this is a lower percent than the BOCs and independent LECs actually held at the time of the Commission's decision two years earlier to assess USF on payphones since the unbroken trend has been for independent PSPs to increase their market share.

¹³ Trends in Telephone Service, at 7-9.

¹⁴ In fact, the number of payphones in place now, based on the experience of APCC Services, an affiliate of APCC's and the largest processor of payphone dial around compensation payments, is somewhere in the neighborhood of 425,000. APCC here uses the latest official statistics to indicate relative market shares. There is anecdotal information that indicates that independent LECs have also sold off some of their payphones so that the share of payphones provided by independent PSPs is actually larger than indicated in the textual discussion following this note.

¹⁵ But see preceding footnote.

In these circumstances, the Commission must re-examine its original conclusion. *See Geller v. FCC*, 610 F. 2d 973, 980 (D.C. Cir. 1979) (When "justification [for the rule] has long since evaporated", the agency is obliged to revisit its conclusion). *See also WWHT v. FCC*, 656 F. 2d 807, 819 (D.C.Cir.1981) (Agency must have another look "if a significant factual predicate of a prior decision . . . has been removed"). With upwards of 90% of the industry now controlled by independent PSPs, a rule imposing USF contributions on PSPs in order to equalize the terms of competition with the handful of independent LECs would be arbitrary. Rather the sensible course is for the Commission to remove the requirement that the LECs pay into the USF based on revenues from their payphone operations. ¹⁶ Just as the Commission based its decision on equalizing competition for the dominant providers in the market at the time of the 1997 decision, so too must the Commission now accommodate the market by conforming the Commission's requirements to what is sensible for the vast majority of providers.

As we have discussed above, however, merely relieving PSPs of the obligation to contribute to USF is not sufficient. Now that the rationale for bringing PSPs into the USF fold is gone, the appropriate course is for the Commission to release PSPs from providing USF support.

Other Public Interest Considerations Militate in Favor of Releasing PSPs From Providing Support for USF

It is useful to begin by stating, as APCC has stated elsewhere, that payphones are themselves a critical component of universal service. By their very nature, payphones already provide support for and "contribute" to universal service.

¹⁶ As discussed above, the Commission has never addressed the merits of whether the original basis of imposing contribution requirements on PSPs is legally correct and/or compelled. *See* note 9, *supra*. Moreover, to the extent the Commission has addressed this legal issue, it has characterized it as a "policy" issue. *See Federal-State Joint Board on Universal Service*, Order on Reconsideration, *supra*, note 9, 19 FCC Rcd 23838 (APCC's legal arguments are a disagreement "with the Commission's policy decisions"). The Commission is clearly free to change a policy determination based on changed facts.

Payphones are the epitome of universal service. Payphones are deployed and made available at no cost. Payphone service is "always on." It is an on demand reliable high-quality dial-tone service, available twenty-four hours a day, seven days a week, 365/6 days a year. *Unlike every other form of communication available to the public*, users are not required to make an initial investment in equipment, await activation of the service or pay recurring monthly charges. Users can call anywhere at any time. Users have the option of paying for calls with coins or by use of calling cards, prepaid cards or other access code arrangements. Users can also place calls to 800/toll free subscribers at no charge to the caller. ¹⁷ And of course, full 911 service and TRS calling are also available free of charge twenty-four hours a day, seven days a week across the nation's public payphone base. No other service provider except PSPs, and certainly not providers of wireless mobile, makes available or deploys such a service —much less for free—with no assurance of any recovery and at no cost to any end user. It is those who are without service at all —low income consumers—who are most in need of the availability of these services. ¹⁸

Moreover, as also noted elsewhere,

After taking account of the reforms adopted by the Commission, including increased outreach, changes in eligibility guidelines, and reforms to eliminate duplication, ineligibles, and other abuses, the take rate for Lifeline support at the end of the next three years will be at 51%. *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, *Lifeline and Link Up*, WC Docket No. 03-109, *Federal-State Joint Board on Universal Service*, WC Docket No. 96-45, *Advancing Broadband Availability Through Digital Literacy Training*, WC Docket No. 12-23, FCC 12-11, at ¶¶ 357 et. seq. and accompanying footnotes (Adopted January 31, 2012, Released February 6, 2012). Thus *about half the eligible Lifeline recipients will still be without service*.

Thus payphones continue to have a critical role to play in serving both that half of the low income population that will be unserved even after Lifeline reforms and in supplementing service to those who are the beneficiaries of the existing and reformed Lifeline program. Indeed

¹⁷ There is more than anecdotal evidence that this service in itself is an enormous advantage for low income users who make extensive use of payphones to call the toll free numbers often available to reach social service agencies, such as food stamp agencies, employment agencies, drug hot lines, etc. The long hold times that are sometimes associated with these services make it impractical to use Lifeline supported wireless phones for these calls since doing so will rapidly diminish the allotment of minutes. (Footnote in original.)

¹⁸ Petition for Partial Reconsideration of the American Public Communications Council, Lifeline and Link Up Reform and Modernization, WCB Docket No. 11-42, at 5-6 (filed March 28, 2012) (this footnote added) (hereafter "Lifeline Recon.")

¹⁹ *Id.* n. 25, emphasis added (this footnote added).

payphones now serve virtually exclusively those consumers who are the targets of the Commission's low income programs as well as other low income consumers. ²⁰ At the same time, the number of payphones has been declining dramatically, and payphones are under extreme financial stress. These points have been documented elsewhere in various Commission dockets and filings, and those filings are explicitly incorporated herein by reference. ²¹

The Commission can directly help stem the decline in service to low income consumers by releasing PSPs from the obligation to provide support for USF. ²² The public interest standard of Section 254 surely requires that an embedded base of telephones serving almost

²⁰ "As APCC has explained in . . . [an earlier proceeding in response to] comments . . .[that]

raise the bogeymen of a payphone in expensive malls and payphones in "prestigious social clubs." By definition and by the logic of the comments that raise these very arguments, upper and middle class shoppers and clients who frequent these premises will not be the ones using the payphones there, if there is a payphone there. Those shoppers and clients will be using their mobile phones. The users of the payphones will be the patrons who otherwise are without mobile service—either for temporary reasons (like battery failure) or because they cannot afford service—and the low income workers who provide the services to those shoppers and who are the low income people at whom universal service is directed. It is the line cook at the "prestigious social club" being paid minimum wage who will use the payphone on her break to check in with her husband or the domestic worker who is stuck at the bus stop in Bethesda, MD who will be using those phones to get word to the child care center. Similarly, it is the relatively low income traveler at the airport who can't afford mobile service who will be using those payphones but who will have no means of communicating when those phone booths are replaced with charging stations {for mobile phones}, as even casual observation makes clear is happening."

Id. note 18.

²¹ Lifeline Recon, Exhibit 1; Petition for Rulemaking to Provide Lifeline Support to Payphone Line Service (filed December 6, 2010), Exhibit 2; Emergency Petition for Interim Relief to Prevent the Disappearance of Payphones (filed December 6, 2010), Exhibit 3. For the convenience of the parties and the Commission, a copy of each of the documents, as downloaded from the Commission's web site, is attached hereto as the indicated exhibit.

It is possible that PSPs could no longer be covered under some of the alternatives offered in the FNPRM. For example, the Commission has asked whether it should determine coverage based on the type of provider or on the basis of the service provided, and within the latter, whether it should matter whether the provider is facilities based or not. *See FNPRM* at ¶¶ 36-71, 75-81, 83. PSPs and payphone service should be excluded no matter which approach the Commission adopts. There are several possible permutations of the Commission's proposals that could accomplish this result. Moreover, PSPs have no strongly held views as to the general approach the Commission should follow and do not wish to favor one industry segment or another. The important result is that whatever the Commission's approach, PSPs and/or payphone services are released from having to provide USF support.

entirely those who are the intended beneficiaries of Section 254 should not itself be burdened by the expense of providing support for USF.

Moreover, unlike other providers of service to low income users (except ILECs with respect to Lifeline service), it is neither practical nor consistent with Commission policy for PSPs to pass this cost through to users of payphones. ²³ Thus the imposition of USF contribution obligations weighs particularly heavily on PSPs.

On the other hand, not requiring PSPs to support USF will not interfere with the Commission's three stated objectives of reform: efficiency, fairness, and sustainability.²⁴ Relieving PSPs of the obligation to support USF will not interfere with any reforms the Commission may adopt for reasons of efficiency nor impose any new burdens on the system. For example, whatever steps and procedures the Commission adopts to otherwise address relations between wholesalers and their customers can be applied to PSPs and their vendors. There are no special requirements that need to be put in place.

Moreover, releasing PSPs from support obligations, including pass-through charges, can be easily implemented. ²⁵ LECs provide a particular class of service for payphones. ²⁶ Those

²³ For a further explanation of PSPs' inability to pass on USF charges, *see Exhibit 4*, attached, which is excerpts from comments filed by APCC in response to the Commission's December 13, 2002 Second Further Notice of Proposed Rulemaking, *Federal-State Joint Board on Universal Service*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952 (2002), 67 Fed. Reg. 79543 (Dec. 30, 2002) (hereafter "*Second Further Notice*"), and which is explicitly incorporated herein by reference.

 $^{^{24}}$ E.g. FNPRM ¶¶ 22-26.

²⁵ The Commission directed that entities qualifying for *de minimis* status be treated as end users by underlying carriers and that carrier revenues from entities qualifying for *de minimis* treatment be included in the carriers end user revenues in the Fourth Order on Reconsideration. *Federal-State Joint Board on Universal Service; Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge Universal Service First Report and Order, 13 FCC Rcd 5318, 5382 (1997) (hereafter "Fourth Order on Recon.").*

lines can be released from pass-through charges. Revenue from those lines can simply be excluded from the LEC contribution base. Similarly, IXCs generally know their PSP customers but in any event are responsible for tracking calls from payphones for purposes of tracking dial around compensation. ²⁷ The IXC's would not impose pass-through costs on those interstate calls²⁸ and would exclude revenue from those calls from their contribution base. ²⁹

Nor does the proposal to release PSPs from support requirements raise any issues of fairness or competitive imbalance. As discussed above, there are no longer any competitors to independent PSPs who would be affected by allowing independent PSPs to be released; the only competitors providing payphone services, the LECs, have abandoned the payphone business. ³⁰

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As an initial matter, it is clear from the most casual empiricism that the emergence of mobile wireless services has had a devastating impact on payphone deployment but that the presence of payphones has had virtually no impact on the proliferation of wireless deployment. Moreover, even a substantial increase in payphone deployment would be unlikely to affect wireless penetration because mobile phones provide an array of services and flexibility not

⁽footnote continued)

²⁶ The service has various nomenclature, *e.g.*, public access line ("PAL"), Customer Owned Coin Operated Telephone ("COCOT"), payphone line, etc. but PSPs always subscribe to a particular class of service designated for payphones.

²⁷ See, e.g., Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 18 FCC Rcd 19975 (2003) subsequent history omitted.

²⁸ For payphones, the delineation between interstate and intrastate calls is clear and using interstate traffic as the basis for calculating the amount of USF support to be provided is not problematic. In the *FNPRM*, the Commission has raised the question of whether it should look to some other basis for calculating the contribution base for USF. As mentioned above, *see* note 22, PSPs have no desire to enter the debate on those issues in a way that affects other segments of the telecommunications industry and have no strong views as to the bases for calculating the amount of USF support provided by individual entities. PSPs and payphone service should be excluded no matter what approach the Commission adopts to this issue.

²⁹ While the discussion in the text is in terms of end user revenue as the contribution base, the same logic applies if the Commission determines to use numbers or a connections or class of service basis for calculating contributions.

³⁰ In another and different context, providing Lifeline support for payphone line service, PSPs have argued that it is competitively unfair to provide Lifeline support for mobile services but not provide it for payphone line service. *See Lifeline Recon*, Exh. 1, at 19-22; *Petition for Rulemaking to Provide Lifeline Support to Payphone Line Service* (filed December 6, 2010) Exh. 2, at 22-23; *Emergency Petition for Interim Relief to Prevent the Disappearance of Payphones* (filed December 6, 2010), Exh. 3, at 4. But unlike disparities in receiving Lifeline support, there is no, or only a negligible, competitive impact from requiring wireless providers to contribute to USF while releasing PSPs from support requirements.

Releasing PSPs from the obligation to provide support to USF would also not affect the sustainability of the USF. Payphones make only a small contribution to universal funding. APCC estimates that there are now about 400,000 payphones and that they pay approximately \$2,500,000-\$3,000,000 in USF a year, including both direct payors and *de minimis* payors who pay only pass through charges. This is not enough to affect the sustainability of the USF fund. But on a payphone by payphone basis, the additional cost is enough to affect the viability of particular payphones.

As explained above, and in the attachments, ³¹ the loss of a single payphone leaves multiple users with no service at all. And these users are the precise intended beneficiaries of universal service --low income users. There is virtually no question but that at this point in time, the services provided by payphones are provided overwhelmingly if not exclusively to low income users. ³² Thus, while the impact on the sustainability of the USF is virtually non-existent, the results of not releasing PSPs from providing support for USF returns large dividends to the goals of the universal service program.

⁽footnote continued)

available from fixed stations but the reverse is not true. In addition, as APCC has explained, the loss of even a few payphone calls formerly placed by end users who have qualified for Lifeline supported mobile devices can render a payphone economically unsustainable, because the mobile service can be a close to complete substitute for the payphone for those users, and lead to the removal of the payphone. See Exh.1, at 9-11, Exh. 2, at 20-22, and Exh. 3, at 4-5 . The reverse is not, however, true; if the same mobile user does some calling from payphones, it does not affect the viability or the economics of the service provided by the wireless provider and could not be a substitute for the wireless service, although the presence of payphones could be a check on certain excesses by wireless providers and complement the service provided by wireless in some instances, such as for calls where the caller is likely to experience long hold times or call outside of the prepaid limits. See Exh. 1 at n.21, and Exh 2 at 16. Payphones and wireless services thus each have a disparate impact on the other. Thus, parity in receiving Lifeline support for the wireless and payphone services is an entirely different issue from the obligations of each of the industries to provide support to USF. There is no discernible impact on the wireless industry that would arise from a difference in obligations to provide support to the USF regime as between wireless providers and PSPs.

³¹ See Exh. 1, at 9-11, Exh. 2, at 20-22, and Exh. 3, at 4-5.

³² See note 20, supra.

In sum, the public interest is well served by releasing PSPs from the obligation to support the USF.

If PSPs Are Assessed USF Charges, The Charges Should be Reduced

In earlier comments submitted in predecessor proceedings to the instant proceeding, PSPs have explained why, under either a revenue based system, a numbers based system, or a connections based system, PSPs should be assessed USF charges at a lower rate. Attached to these comments as Exhibit 5 ³³ and Exhibit 6 ³⁴ are excerpts from some of those earlier comments.

In summary, the Commission recognized that PSPs should be assessed USF charged in a connections based environment at the same rate as single line business and residence lines. ³⁵ APCC agrees that the charges should be no more than the rate for single line business and residence lines. Similarly, and in accordance with the Commission's recognition that the single line business and residence line is an appropriate analog to the payphone line in the connections based environment, the Commission should require that any pass-through charges imposed by the LECs or other carriers should be calculated at most on the same basis as the pass through charges for single line business and residence lines, and not on the basis of the pass-through associated with multi-line business lines, no matter what system – whether revenue, connections,

³³ Excerpts from Comments of the American Public Communications Council, submitted in response to the *Second Further Notice*, *supra*, n. 23. These excerpts are explicitly incorporated herein by reference.

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³⁴ Excerpts from Comments of the American Public Communications Council, submitted in response to *Federal-State Joint Board on Universal Service*, Further Notice of Proposed Rulemaking and Report and Order, 17 FCC Rcd 3752 (2002) (hereafter "*Further Notice*"). These excerpts are explicitly incorporated herein by reference.

³⁵ See Exh. 5.

numbers, or some other basis-- the Commission adopts for calculating contributions.³⁶ But the Commission should further reduce the pass-through charges under either a revenue based system, a connections based system, or a numbers based system because of the manner in which payphones lines are used. APCC has explained that payphones should be placed in their own category and assessed at a level that is one fourth the level of assessment of single line business and residence lines. ³⁷

De minimis Status Should Not Preclude Direct Filing

The current contribution system results in a number of anomalies. One of them is that *de minimis* providers, who are the smallest of the small businesses that comprise the PSP industry and presumably the intended beneficiaries of the current *de minimis* exemption, end up paying more per payphone in USF support than larger PSPs who are not *de minimis* providers.

Both a *de minimis* payor and a direct payor will pay roughly the same amount of USF support on interstate traffic originating from a typical payphone. The few PSPs who contribute directly to USF follow the same procedures as any other filer. These include signing a resale certification for both the serving LEC and any other carriers with which the contributing PSP transacts business, paying no pass through charges imposed generally on customers by those vendors, and then following the Commission's filing procedures, including filing both the annual

³⁶ Currently pass-through charges by the LEC are based on the End User Common Line/Subscriber Line Charge, although the Commission has indicated that basis may change. *See FNPRM* at n. 418. The LECs uniformly assess the pass-through charge by using as the basis for their calculations the business multi-line rate. While the Commission could move away from the uniform rate for single line business and residential as proposed in the *Further Notice* and *Second Notice*, if it does, the Commission should assess payphone service as described in the footnote following this one based on the lower of the two line rates.

³⁷ See Exh. 6, at 3-6; *id.* at, 6-8 (suggesting that based on the Commission's then proposed rates for paging connections and the usage of payphones, payphones should be assessed in their own category and that the appropriate basis for assessment is at about one-fourth the level of assessment of the rate then proposed for a single-line business line and a residence line).

and quarterly 499s and making payments to USF in accordance with USAC's billing. Those payments will include the relevant assessments on interstate revenue. The *de minimis* payor will typically pay in the form of pass-through charges from an IXC and those charges are typically in the same range as the payments made by the direct contributor on interstate traffic from the typical payphone.

But there is a significant difference between what each pays in LEC pass through charges. Instead of paying the LEC pass-through charges, which are based on the multi-line business End User Common Line/Subscriber Line Charge, the direct payor can appropriately allocate the amount of the LEC pass-through charge between interstate and intrastate traffic as part of its process of completing its 499 forms. Since almost all end user revenue is for local coin calling, the allocation to interstate is significantly less than the amount of the LEC pass-through charges. By contrast, a *de minimis* PSP must accept the LEC pass through charges and pay the full amount of the LEC pass-through.

In addition to the obvious inequity of the smaller PSP paying more per phone, this also creates an imbalance as between PSPs. It also results in a jurisdictional distortion since the *de minimis* provider is paying interstate USF on a facility whose end user revenue is in fact primarily earned by intrastate local coin calling. ³⁸

³⁸ It is unlikely that the issues raised in the text will be ameliorated by any method the Commission adopts for addressing either wholesale relations, e.g., the value added approach, *see FNPRM* at ¶¶149-161 or the assessment of support for USF based on value added. There will still be a need for a *de minimis* category and the attendant issues described in the text will exist.

The Commission can easily rectify this situation by providing that PSPs (and other *de minimis* payors) have the option of filing 499Qs and paying directly. ³⁹ This is consistent with the Commission's rationale in setting the *de minimis* cut off. The Commission originally had included only the USAC's administrative costs of collection and excluded the costs of the party paying into the USF from its cost calculus in setting the *de minimis* cut off at \$100. ⁴⁰ On reconsideration, in response to petitions from providers who provide integrated communications packages, the Commission included as well the costs to the contributor of compliance, including all the costs of completing the paperwork and performing the calculations, increasing the qualifying level for *de minimis* to its current \$10,000. Thus, it is plain that the current level of exemption is driven by the needs of and costs to payors of compliance. ⁴¹

Giving *de minimis* payors the option of filing as direct contributors and payors is thus consistent with the Commission's concern with the costs to the payor of compliance. Any *de minimis* payor electing to file and pay directly would clearly have done the payor's own cost/benefit analysis and concluded the benefit of direct contribution, and escaping the imposition of pass-through charges, exceeded the costs of compliance. The Commission should provide for *de minimis* PSPs to exercise this option in order to rectify the current inequities, and imbalances within the PSP industry. Granting *de minimis* PSPs the option of filing is also consistent with the policy of relieving small businesses of unnecessary regulatory costs.

³⁹ There does not appear to be a Commission rule that prohibits *de minimis* providers from filing 499Qs and paying directly but USAC does not accept direct filings by PSPs qualifying for *de minimis*. Therefore, the Commission needs to expressly provide permission for *de minimis* filers to file directly in place of using the *de minimis* exemption.

⁴⁰ See Fourth Order on Reconsideration, 13 FCC Rcd at 5480.

⁴¹ *Id.* at 5480-81. The Commission also included some additional costs incurred by USAC, but it appears these costs accounted for a small amount of the increase and that the Commission's decision was driven by the costs to payors of compliance.

Other Issue

One additional issue warrant brief comment. The Commission asks whether prepaid calling card providers and PSPs should be treated symmetrically with regard to payments received by prepaid providers from distributors (in essence treating the discount off face value of the card as a payment to the distributor) and PSP commission payments to premises owners. ⁴² In light of the Commission's concern with competitive parity, as discussed above, there is no question but that symmetrical treatment is warranted in those instances where PSPs can still pay commissions to premises owners.

CONCLUSION

For the foregoing reasons, the Commission should release PSPs from the obligation to provide support to USF. If the Commission does not grant this relief, it should base PSPs' assessment for USF on a fraction of the basis upon which single line business and residential lines are assessed. In addition, if PSPs are required to provide support to USF, the Commission should direct that PSPs qualifying for the *de minimis* exemption be allowed to file as direct contributors. The Commission should also treat PSPs and prepaid calling card providers symmetrically.

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⁴² *FNPRM* at ¶187.

Respectfully Submitted,

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